THE JOURNAL
OF
POLITICAL ECONOMY

VOLUME 20 *FEBRUARY—1912* NUMBER 2

AMERICAN RAILWAY RELIEF FUNDS

II. RELEASE CONTRACTS AND MUTUAL RELIEF

I

Our American commonwealths have hitherto furnished no statutory plan by which certain reasonable differences over compensation for occupational injuries can be settled without a trial of the issue in a court of justice.[1] It has been left, therefore, under the individualistic policy of our industrial evolution, to private initiative to devise ways and means which, while without the courts, still lie within the law, and which, while perhaps not acceptable to, are still accepted by, both parties in preference to the risk of embarkation on the expensive and treacherous sea of litigation.

A search for the basic movement underlying and impelling this initiative discloses the fact that many of the systems of relief at present in vogue take their start from a legal theory of the sources

[1] New York had in operation for a short time subsequent to September 1, 1910, a compulsory compensation law covering a limited number of dangerous trades. In March, 1911, the New York Court of Appeals declared this law contrary to the constitution both of New York and of the United States, so that the statement in the text is still correct. A number of states (Ohio, Illinois, Massachusetts, New Hampshire, Minnesota, Kansas, Wisconsin, New Jersey, Washington, Montana, and Michigan) have passed or are contemplating optional compensation statutes, but Wisconsin, Ohio, and New Jersey are as yet the only states in which even optional compensation measures are in operation. Optional compensation laws go into effect January 1, 1912, in Kansas and New Hampshire. The Illinois law takes effect May 1, 1912. State accident insurance laws have been in force for a short time in Washington and Montana, but the Montana statutes have failed to outlive the recent scrutiny of the Supreme Court of that state (see *The Survey*, January 6, 1912).

of *liability for negligence*, and have for their primary end the desire, not so much to compensate the servant for the suffering and privation incidental to injury and disability, as to provide an avenue of escape for the master from the expense of caring for the wounded and from the annoyance of claims arising through contingent liability. In the absence of any binding methods or terms prescribed by the state, the initiative and the point of vantage have hitherto been primarily the master's, and the first objects sought have been relief and protection for himself. It follows that these methods of relief may be separated one from another by simply inquiring what the master does with his unpleasant burden of moral or legal responsibility. For, so far as the servant is concerned, in the absence of statutory protection, the pressure of necessity has been such that, where questions of free will or mutuality arise in connection with his formal indorsement of relief measures, he has dropped obediently and unquestioningly into any groove leading toward a regular pay check. To be sure, the introduction of new "voluntary and mutual reliefs" has occasionally been attended by initial resistance, but when the working body has had its sense of arithmetic put safely to sleep by well-established custom, the master has met with little subsequent trouble in the operation of any plan which he may select.

From the employer's standpoint, then, we may classify present-day compensation methods as follows:

First type: The employer shifts the load upon a *go-between* and buys a certain sort of surgical attendance, as well as immunity from damage claims, with an employer's liability policy.[1]

Second type: The master organizes and pays for his own relief department, and carries his own insurance, without shifting the burden of liability or the expense of care and compensation. He deals *directly* with his workman, but without formal or mutual agreement.[2]

[1] The reader is referred for a discussion of Employers' Liability Insurance to *Chicago Medical Recorder*, June and July, 1910; *Illinois State Medical Journal*, June, 1910.

[2] Certain favorable aspects of this method have also been treated elsewhere by the writer: *Journal of the American Medical Association*, November 12, 1910. For a darker side of the shield see, C. Eastman, *Work Accidents and the Law*, 1910, Pittsburgh Survey, Sage Foundation.

Third type: The master calls upon his servant to assist him with the burden, and it is carried *jointly*, through the intervention of some self-sustaining, more or less voluntary, and more or less mutual insurance or assessment body. The present paper has to deal with certain of these mutual varieties of American insurance against the injuries of commerce and industry.

II

Continued investigation confirms the opinion, already briefly stated, that in the absence of statutes the "mutual" and "voluntary" relief departments at present existing—and vitally necessary until compensation acts are operative in the United States—have, with few exceptions, been originated and worked out, and are now conducted primarily in the interest of the employer. That this is possible is not particularly surprising in view of the fact that in the act of employment the master has, at least at the outset of his relations with his servant, matters almost entirely in his own hands, and can shape the policy and objects of any relief body to suit his own purposes. Employment thus easily becomes contingent on some kind of agreement, and the employer calls later on the ingenuity of his lawyers to legalize the transaction. It has never been difficult to persuade our judiciary that these agreements contain the three factors essential to lawful contracts—mutuality, consideration, and free will.

So long has this advantage of initiative lain with the employer, and so numerous have been his unrestricted opportunities to establish precedents of law and formulas of thought, that he and his agents have now come to hold themselves securely intrenched behind judicial rulings, and even feel a little hurt if questioned whether the words "voluntary," "mutual," and "in consideration of" as applied to relief organization and their contracts actually mean what they say. Such an employing individual has little hesitation, not only in absorbing to himself the credit for all the expensive benefit devices with which he provides his servant, but also in ignoring the fact that the servant's benefits, as well as the master's very substantial advantages, are apt to be paid for largely out of the servant's contributions. But let us brush to one side

the screen of casuistry which time and custom, and the easy precedents of courts, and false and selfish reasoning from devious statistics have raised to cover the naked and arithmetical truth as to these important relations; we shall presently see how pitifully many great American railroad corporations have failed in their plain and fundamental duty toward those whose labors have helped to build up their accumulations of plant and profit and good-will, and how niggardly have been any voluntary concessions to the needs of those wounded in our modern machinery of transportation.

These departments, with their carefully drawn release contracts and studied mutuality, display curiously familiar aspects to the student of economic history. In our own industrial development they closely parallel the defenses into which the English master betook himself subsequent to the Employers' Liability Act of 1880 (Gladstone). The English practice of "contracting out" reached the height of its evil but legal efflorescence in the half-generation which preceded the first Workmen's Compensation Act (Chamberlain 1897), and was made possible by the lack of a prohibitory clause in the Gladstone Act. The store set by the English employer on this privilege was shown when the clause prohibiting it defeated the Employers' Liability Bill of 1893 (Asquith). In our own country, with state legislatures more or less hostile to the employer, the weapon wielded by his legal advisor to perpetuate his "release contract" has usually been the higher courts acting through constitutions to evade or annul state laws voiding such bargains between master and man. Under English law, the employer fights his battles in Parliament; the employer of American labor tells his troubles, as we shall see, into more sympathetic judicial ears and invokes the Fifth and Fourteenth Amendments to the federal constitution.

III

American railroad relief organizations divide themselves into nearly as many classes as there are corporations. The purpose of this article calls for no notice of bodies governed and supported entirely by the workingmen—fraternal orders, trade unions, or accident and "industrial" insurance. "Company Reliefs" may

be broadly classified under two great heads: (1) Those organized by employers and supported by assessment of employees, for the sole purpose of giving hospital and professional relief to injured and sick employees; and (2) Those which join to the first object a second—the release of the employer from claims for damages, through the payment of indemnity money from a fund actually or nominally contributed to by both master and servant.

The first class of relief bodies usually lays little claim either to mutuality between master and servant or to voluntary membership—the master contributes nothing beyond collection and management of the fund, and the servant joins the relief automatically on entering the service. There are, however, notable exceptions to this rule—a few among railroads—in that some employers not only contribute real cash to the fund, but also make the membership honestly voluntary. The scope of organizations of this first class is necessarily narrow and the benefits limited. Many of them provide only for the care of the injured; others care for both sick and injured, but pay no cash benefits either for disability or for death; still others pay small disability and death benefits. Their scope differs very little from that of the relief features of the fraternal orders, except that those funds administered by the master may be conceded to be more intelligently handled, and to accomplish their duties more promptly and economically, than those intrusted to less experienced managers.

The purposes of employers in organizing funds of this first kind have probably been three: first, to systematize the relief and to see that it reaches every man in his emergency, irrespective of his deserts and financial status; second, to escape the financial burden incidental to such measures when assumed by the employer; third, to counteract certain of the influences, arguments, and advantages in favor of independent trade unions and fraternal orders usually animated by a spirit more or less unfriendly to the master.

Although the financial and legal status of organized relief minus the release contract is necessarily limited and simple, it presents a number of interesting ethical and economic aspects to which the writer has already referred in another paper.[1]

[1] See *Journal of Political Economy*, XX, 49–78.

It is with the second class of relief fund, as it is developed on certain American railroads, that the present article undertakes to deal.

IV

Six American railroads have organized complicated and highly specialized systems of relief based on nominal mutuality and free will, to which have been added devices in the form of contracts aiming to secure the release of the employer from liability for the injuries of employees. These organizations are the Chicago, Burlington & Quincy R.R. (relief department), the Pennsylvania R.R. (voluntary relief department; separate departments for lines east and west of Pittsburgh), the Baltimore & Ohio R.R. (relief department)[1], the Atlantic Coast Line R.R. (relief department), the Philadelphia & Reading R.R. (relief association), and the Lehigh Valley R.R. (relief fund).[2]

None of these departments is now incorporated. Several of the reliefs were started as incorporated and somewhat independent bodies, but it was soon discovered that chartered organizations not only showed serious legal weakness but also possessed dangerous power not always operating in the companies' interest. All, therefore, have been reorganized as unchartered departments without autonomy.[3]

All these railroads except the Philadelphia & Reading[4] pay surgeons out of the fund, and several departments maintain hospitals. The funds are fed from graduated assessments of employees and pay graduated allowances for sickness and injury for a certain number of weeks, with graduated death benefits to

[1] The regulations of the Baltimore & Ohio relief department are unique in specifying that all employees of the operating department *must* join the relief. The regulations of the other roads would appear to leave the matter at least nominally voluntary.

[2] Identical departments are also maintained by some of the Westinghouse corporations. The International Harvester Co. and United States Steel Corporation plans come also within this classification but are not here considered.

[3] The Baltimore & Ohio Employees' Relief Association charter was revoked in 1888 by the state of Maryland on account of the obligatory clause. The company then organized the present unincorporated department (March 15, 1889) with membership compulsory.

[4] The Philadelphia & Reading Relief Association does not furnish surgical or medical attendance, but pays "medical examiners" out of the fund.

survivors. Each company handles the fund, appoints and controls absolutely a majority of an advisory board with a general officer of the company as chairman, and appoints the superintendent, chief surgeon, and operating personnel of the organization.

The release contract gives the superintendent full power to act in all settlements, except that appeals may be taken to an advisory committee. He takes a formal release before paying any benefits; he is authorized to make lump-sum settlements; his word is final in all disputes over death benefits. He is the company's claim agent in all but name, but wields more power than any claim agent.

The insurance feature has usually been expanded by providing for additional death benefits by additional contributions to the fund at a rate somewhat lower than the usual premiums of fraternal insurance companies (about $15 per thousand below forty-five years of age), and some companies have added pension, savings, and loan features.

Membership is secured by proper execution and approval of an application substantially as follows:

APPLICATION FOR MEMBERSHIP IN THE RELIEF FUND OF THE———R.R. CO.[1]

I, ———, now employed by the———R.R. Co., apply for membership in the Relief Fund, and agree to be bound by the Regulations of said Department.

I also agree, That the Company shall apply, as a voluntary contribution from wages earned by me, the sum of———per month, for the purpose of securing the benefits provided for a member of the Relief Fund.

Any expenses incident to my death, paid by the Relief Department, shall be in part payment of death benefit and deducted from the total amount thereof.

I also agree, That, in consideration of amounts paid by said Company for maintenance of said Department, and of the guarantee by Company of said benefits, acceptance by me of benefits shall operate as a release of all claims against said Company for damages arising from said injury; in the event of my death no part of said death or disability benefit shall be payable unless releases shall be delivered to the Superintendent of all claims against said Department, as well as against said Company; and further, if suit shall be brought against said Company for damages arising from injury or death occurring to me, the benefits otherwise payable, and all obligations created by my

[1] Somewhat condensed.

membership in said Fund shall be forfeited without any declaration or act by said Department.

I also agree, For myself and those claiming through me, to be bound by the Regulations providing for final settlement of all claims or controversies by reference to the Superintendent of the Department, and an appeal to the Advisory Committee.

(*Signed*).....

This document is, of course, really an application for insurance against sickness, injury, or death. It is also a carefully worded agreement or contract binding the signor (the insured) to make certain payments (premiums) into the department fund (the insuror) from which the insured is to receive certain benefits in case of disability. But, unlike ordinary insurance agreements, there is a third party to the contract, or rather the insuror appears in two rôles, the "department" and the "company." Before the insured can get his money from the department he must make his peace with the company and must satisfy its claim against the fund; otherwise the insured forfeits (although any mention of such forfeiture is omitted from the contract) all the payments which he has made into the fund up to the time of his injury. The company gains entrance into and acquires rights in this hitherto simple insurance transaction by the rather unusual process of acting as agent, or go-between, or guarantor, or manager, between its own creature, the department fund, and its own employee, the insured. In order to protect the rights which it thus acquires, the company virtually impounds that portion of the fund which is due the injured employee, until his bill for fiduciary services has been liquidated by a release from any claim which the employee would otherwise make for the company's causative share in his injuries.

The ethics and equity of this application-release agreement will be considered later. It is sufficient to state, at this point, that, although many states have tried, by statute, to forbid release contracts between master and man, and especially between railroads and their employees, the railroads have been almost uniformly successful in protecting their contract in both state and federal courts. The early rulings of the Pennsylvania and Ohio courts in cases testing the validity of the Pennsylvania R.R. and Baltimore & Ohio contracts have been usually followed without many embarrassing qualms by the courts of other states.

After an employee has entered the service and has executed the application-release his assessments become automatic, and he or his family is indemnified for sickness, injury, or death, on a graduated schedule indicated in the following condensed table:

TABLE OF ASSESSMENTS AND BENEFITS OF———RELIEF DEPARTMENT*

Monthly Pay	Contributions	Class	Daily Accident Benefits for 52 Weeks	Loss of Each Arm or Leg	Daily Sick Benefits	Death Benefits
$35 or less	$0.75 mo.	1	Per day $0.50	$ 800	$0.50	$ 300
35 to 55	1.50 mo.*	2	Per day 1.00	1,400	1.00	600
55 to 75	2.25 mo.	3	Per day 1.50	2,000	1.50	900
75 to 95	3.00 mo.	4	Per day 2.00	2,600	2.00	1,200
96 or over	3.75 mo.	5	Per day 2.50 and half-rates after 52 weeks	3,200 Lump sum and double for two extremities	2.50 and ½ for second year	1,500

* Rates, terms, and indemnities vary slightly for the different companies.

In some of the companies additional death benefits (of first class only) may be taken out up to two (accident) and three (natural) times the amount of death benefit of the class to which the member belongs, at the rate of 30 cents, if he is under 45 years of age; of 45 cents, if he is 45 to 60 years of age; and of 60 cents, if he is over 60 years of age. This is not far from the cost of ordinary fraternal insurance, and the company gets the benefit of the release.

Although three-fifths of the benefits paid out by the fund are for sickness and for death through natural causes such as should, under ordinary insurance conditions, necessitate an increasing premium with advancing age, the premiums are the same for all ages, except in the few cases where additional death benefits are taken out. On the Pennsylvania R.R. the insurance term is coincident and terminates with employment. On the Baltimore & Ohio, Philadelphia & Reading, and Chicago, Burlington & Quincy R.R.'s, minimum single death benefits—and these only—may be continued by former employees who have been three years in the service, provided they file an application for such insurance at the time of leaving the service. Very few former employees avail themselves of this provision. No provision is made for continuing either accident or sickness disability premiums and benefits on leaving the service.

The following is a brief résumé of certain important details and financial exhibits of the six relief departments which form the subject of this article:

Pennsylvania Lines.—Relief departments were established (by the eastern lines in 1886; by the western lines in 1889) to succeed the incorporated associations. Membership is nominally voluntary. The death benefits are, in Class 1, $250; in Class 5, $1,250. The statement for the western lines, June 30, 1909, showed:

Surplus account	$568,804.02
Collected from men for the year	659,173.55
Paid for death and disablement by accident during the year	154,380.50
Paid for death and disablement by sickness during the year	344,146.25
Contributed by companies as deficits, maintenance, and company relief	107,607.79
Under "Contributions by Companies" is found "Interest on balances" in 1908	13,943.13

The Baltimore & Ohio R.R. Co. Relief Department.—This was established in 1889 to succeed the outlawed chartered association of 1882. Membership is obligatory. The company uses a form of application for employment in which is incorporated, as one of the conditions of employment, an application for membership in the relief feature. The application contains the usual release clause. The operation of the Baltimore & Ohio R.R. plan is similar to that of the Pennsylvania R.R., but its details are still more favorable to the company. The annual report for year ending June 30, 1909, shows:

Credit balance or surplus	$1,034,914.25
Collected from men during the year	846,721.28
Contributed by Baltimore & Ohio R.R. toward operating expenses	10,550.00
Contributed by Baltimore & Ohio R.R. toward "Company Relief"	6,000.00
Contributed by Baltimore & Ohio R.R. toward Pension Fund	75,000.00*
Accident Benefits paid (death and disability)	263,607.00
Sickness Benefits paid (death and disability)	439,413.43
Total Disbursements for all causes	854,370.30
Death Benefits, Class A, accident $500; natural death	$ 250.00
Death Benefits, Class E, accident $2,000; natural death	1,250.00

* The company also furnishes several offices, and the services of its officers. The $10,550 is to cover examinations of applicants for service; the $6,000 is to cover company relief to meet deficit; if not used for this purpose the cash goes to the pension account; $75,000 is also paid in by the company on account of pensions, but is exhibited in the annual statement of the relief department as a contribution to that department. Why the department reports should represent any of these items, except the contingent $6,000, as contributions to a mutual relief fund, is cryptic, until viewed in the light of the fact that some sort of a cash showing must be made to satisfy the requirements of the courts when the release contract is under scrutiny.

The department also operates savings and pension features.

Philadelphia & Reading R.R. Relief Association.—This association was established in 1888. It is managed and guaranteed by the company. The company has also in the past made an annual addition of 10 per cent in cash to the amount contributed by the employees. At present the annual cash addition is 5 per cent. The operating expenses for 1909 were $37,214.75, of which $16,998.46 was paid by the "associated companies." The department statement for 1909 showed a surplus of over $626,000, which is increasing at the rate of nearly $60,000 per year. Contributions from employees are from 75 cents to $3.75 per month. For death benefits Class 1 pays $350; Class 5, $1,350. The extra $100 is from the surplus fund, which seems to have reached embarrassing proportions. The Philadelphia & Reading relief department pays out annually about 40 per cent of its entire relief disbursement for injuries, and 60 per cent for sickness. The company probably makes a larger proportional cash contribution to the relief fund than any other American road, except the Lehigh Valley R.R. The present assessment rate is too high and would carry the fund without any contribution from the companies, thus saving to the men their rights to recover from their employer. The surplus invested permanently in the debt of the company is about equal to the total of the companies' contributions for twenty-one years.

Relief Department of the Atlantic Coast Line R.R. (Plant System).—This, rating from 1896, 1899, 1902, is the most recently organized of the "mutual" relief departments. The only voice the men have in the management of their money lies in the fact that six members of an Advisory Committee of thirteen are elected by a sort of *scrutin d'arrondissement* from six districts of the railroad—no two from one district. The superintendent and assistant superintendent-medical director, who manage the department, are appointed by the president of the railroad. Surplus funds are invested under the direction of, and in the name of, the company. The company guarantees the fund and makes up deficits, but reimburses itself subsequently out of employees' assessments, so that it is not out of pocket by its guaranty. It "pays expense of management," but this must mean very little, for the fund pays the surgeons *and examiners* and pays for the hospital care of the

injured. The company pays $12,000 annually into the fund;[1] and as the accompanying statement shows, this apparently is the total of the company's contribution to operating expenses and management. It is difficult for an outsider to get an annual report of the fund. Employees "may join" the department; as a matter of fact all healthy employees under 45 in the permanent service of the operating department are members. Death benefits are, in Class 1, $250; in Class 5, $1,250. Sickness benefits are paid for 52 weeks only. Accident benefits are paid for 52 weeks, and thereafter at half-rates. Benefits average about 50 per cent of the wages. The department superintendent is authorized to make lump-sum settlements. Riebeneck gives the following statistics:[2]

Total receipts up to 1905		$409,385.12
From members	$306,817.86	
From Company	98,690.23	
From hospital revenues	3,877.03	
Average annual receipts		87,725.38
Disbursements to 1905		386,231.33
Accident	$35,576.90	
Sickness	86,219.70	
Death	117,241.92	
Operating	96,863.49	
Surgeons and hospitals	50,329.32	
Annual disbursements		82,763.83
Surplus 1905		23,153.79

Chicago, Burlington & Quincy R.R.—This company has maintained since 1889 joint *relief and employment departments* under one superintendent appointed by the president. The chief medical officer of the road—appointed by the president—is the assistant superintendent of this department and draws his salary from the fund. The company's claim department has little to do in the handling of employees' claims. The membership is "voluntary" and about 61 per cent (24,000) of all employees are members. In the operating departments over 95 per cent[3] are members.

[1] Willoughby, *Workingmen's Insurance*, p. 305.

[2] *Railway Protective Institutions*, 1905. Published by Pennsylvania R.R.

[3] Riebeneck gives (1905) the following percentages: engineers, 96 per cent; firemen, 96 per cent; brakemen, 97 per cent; switchmen, 96 per cent; conductors, 90 per cent.

Non-members are either very old employees who were in the service before the relief was organized (1889), or those who are only temporarily employed, or employees at non-hazardous posts. The "Relief and Employment Department"—a judicious blend—sees to it that non-members are not given encouragement to enter upon or to remain in any hazardous service. For a schedule of assessments and benefits the reader is referred to the table on page 109. During twenty years' operation of the department the company has collected $6,600,000 from the men, and during that time has charged the fund $1,250,000 as its own contribution in the forms of salaries, transportation, traveling expenses, postage, office room, stationery, and printing—management. The company does not appear to have added anything in cash to the fund, which, December 31, 1907, showed a surplus of over $600,000. In 1908 the company charged the fund with $78,000 for management as indicated, and collected from the men $505,000, total $583,000—company's estimated contribution about 14 per cent. The fund cares for sick *and* injured in the ratio of about 26 to 30 (paid out for sickness and natural death, $263,000; paid out for injury and accidental death, $300,000). Since no contribution should be expected from the company for sickness relief, its "management" contribution of $78,000 in 1908 should be estimated as for injury disability alone, and is about 26 per cent of the total expenditure for injury relief.

Lehigh Valley Relief Fund.—Although differing in many important particulars from the departments just cited, the fundamental purpose of the Lehigh Valley Relief Fund is so nearly identical with that of these five organizations that one would be at a loss to classify it elsewhere. This fund was established by the company in 1878 as a voluntary relief, and is conducted entirely by the railroad, which pays the expenses of management and collects and guarantees the fund. Employment is the only requisite to membership, as there is no examination or age limit; *but the fund pays no allowance for sickness disability.* Membership seems to be genuinely optional, as in 1903[1] but 35 per cent of the employees had joined (6,505 out of 18,621). Note, however, that 81 per cent of the men in train service

[1] Riebeneck, *op. cit.*

were members. The assessments are not levied monthly, but about every fourth month, and never exceed $3 per member, *and the company contributes an equal amount.* In this contribution the Lehigh Valley R.R. has long held an absolutely unique position among American railroads. The fund seems to enjoy a genuine popularity among the men, for the membership has grown from 1,269 in 1878 to 6,505 in 1903.[1] The benefits vary with the total amount of contribution to the credit of the individual, and the contributions vary with the daily wage. The fund pays accident death benefits as well as weekly indemnity and surgical expenses.

V

Let us now analyze these organizations from various economic, legal, and ethical standpoints.

It is fair to consider, for example, what is offset against the Chicago, Burlington & Quincy R.R.'s insignificant workmen's compensation schedule, totalling annually but $78,000, by companies which do not look to the men for help in canceling their own casualty claims and in paying the company's legitimate surgical and hospital bills.

The following very important expense items appear in the annual balance sheet of every company not operating a mutual relief department: (1) Maintenance of surgical department; (2) maintenance of claim and legal departments; (3) wages, donations, settlements, and judgments paid to disabled employees. We may advantageously collect from the annual reports of certain other roads, not operating mutual relief departments, the figures representing the above items, and calculate from them the approximate amounts of the same items for a road showing the same mileage as the Chicago, Burlington & Quincy R.R. (9,022 miles and over 40,000 employees). The annual surgical expense vouchers[2] of such a road, of equal mileage, will be not far from $75,000; vouchers for all personal injury claim department expenses, exclusive of settlements, about $70,000; all vouchers issued by the law depart-

[1] Willoughby and Riebeneck, *op. cit.*

[2] Salaries, fees, hospitals, nursing, rent, supplies, examinations, stationery, and printing.

ment incidental to personal injury claims, but exclusive of settlements and judgments, $50,000; total expense vouchers $195,000, of which total about four-sevenths—or $112,000—will be for employees. Vouchers issued by the claim department for employees' personal injury settlements will amount to $232,000; vouchers issued by law department for employees' personal injury settlements and judgments, to $210,000. The aggregate is $554,000 paid out in one year on account of injuries to employees. It is significant of the accuracy of this calculation that these figures, independently secured from accurate sources of railroad statistics, approximate very closely the amount with which the Chicago, Burlington & Quincy R.R. in 1908 financed its entire Relief and Employment Department ($505,000 collected from employees; $78,000 contributed by the company).

This estimate is well within a reasonable limit, and amply justifies the conviction that the company in question has unburdened itself at the expense of its employees of six-sevenths of that load of employees' casualty maintenance which it would have had to carry under European compensation laws, or even under our own laws and customs if the company were to be deprived of the relief feature plus its release contract.

This view is also taken by Willoughby (*op. cit.*, pp. 315 f.), who says: "That part of the work of the department which relates to accident should be almost if not wholly at the expense of the employer." "The remuneration of the victims of accidents should be considered a normal item in the cost of operating any industry. This opinion finds scarcely an opposing voice in Europe today." "The burden of accidents should be borne by the employer, who determines the working conditions of the industry, rather than by the employee, who has little or nothing to say. In failing to do this the roads in question are distinctly behind public opinion. An analysis shows that the departments are largely supported by the men themselves." "This is not the only criticism. The roads have sheltered themselves behind their small contributions to exact releases. Mr. Johnson (E. R. Johnson, *Bulletin of Department of Labor, No. 7*) thinks this only just, but from his opinion I must absolutely dissent. That the act of bringing suit should bring

forfeiture of rights acquired and paid for is thoroughly unmoral and contrary to public policy."[1]

VI

Since these relief departments are organized on a contractual basis of considerations paid and reciprocal benefits to be enjoyed

[1] Of course, these views are opposed by a large number of intelligent and honest individuals whose horizon has been narrowed through long and intimate association with the legal, surgical, relief, and claims departments of railroads, and it must be admitted that their position has been strengthened by the fact that the courts have conceded to them, until recently, ample ground on which to stand. Progress along the lines hoped for by the writer of this paper—lines along which the industrial legislation of the entire country is now moving—has always been opposed, not only by a strongly partisan bar and by an influential lobby representative of railroad companies, but also by an equally strong class of politicians representing another group of attorneys who stimulate and prey upon personal injury litigation. So much a part is it of the very subsistence of these three groups of legal and quasi-legal railroad appendages, that one cannot wonder at their honest inability to apprehend the fundamental injustice of all present relief systems, or to grasp the essential fact that equitable workingmen's compensation is an advantage both to the employer and the employee.

I have before me two pamphlets (S. R. Barr, superintendent, Baltimore & Ohio R.R. Relief: *Advantages of the Baltimore & Ohio Relief*, 1909; and J. N. Redfern, superintendent, Relief and Employment Department, Chicago, Burlington & Quincy R.R.: *Railroad Relief Departments*, National Civic Federation, 1909) in which the simple faith of the relief superintendent in the unfaltering altruism and equity of his department is disclosed with naïve unconsciousness. The value and intent of the following extracts have been in no way altered by removal from their context. It seems unnecessary to comment on the curiously distorted point of view represented by these seriously written articles.

Mr. Barr says: "Probably the greatest advantage the company enjoys through the Relief is the examination of applicants for employment and their subsequent close observance by trained medical men. For this the company pays $10,000 as *part of its contribution to the Relief Fund.*" As has already been shown the money does not go to relief and should not be credited to that fund. "The operation of a relief department is practically a guarantee of immunity from employees' damage suits." "The Baltimore & Ohio Relief Department settled, on a benefit basis only, 99.2 per cent of the injury cases and 97 per cent of those of accidental death." "It needs no argument to show an actual saving to the company of an enormous amount of money in damages alone." If the company saved this enormous amount, who was the loser by it—and who paid the bill? "The man refusing to accept his benefits, the amount payable is available as part payment of the settlement." If this is the case, the authority for it is not shown in the department by-laws. "The amicable adjustments operate to the financial advantage of the company in other ways; the corps of claim agents is reduced and legal expense greatly curtailed . . . . and a great deal of unenviable notoriety is avoided in the trial of suits and the newspaper comment thereon." "The company is rid entirely of the expense of half-pay allowances and donations."

by two parties, and legal questions are thus introduced which are not raised in more primitive associations not employing the release form, we may justly proceed with our study of their value to the participants and to the community at large by asking the following questions:

Are the associations in fact voluntary as to membership?

"The company's surgeon's compensation consists only, in most cases, of an annual pass over the company's lines." "The cost to the relief department for surgical and hospital services is only 87 cents per case, or 23 cents per visit paid by the surgeons." "Total cost, including operations, was $1.85 per case." "The surgeons attend also passengers, trespassers, etc.; also a great saving to the company in itself." And who pays? "And they furnish their own supplies." "It is doubtful . . . . if this economical operation . . . . would be successful . . . . without the assistance of medical examiners not embarrassed with outside influences."

The following is one of the professional duties Mr. Barr expects the department's medical men to perform: "When a railroad man dies . . . . the usual course is to *have the medical examiner* get the undertaker's bill and suggest to the widow that she authorize the payment out of the death benefits. It is a rare thing for the Baltimore & Ohio to have to pay an undertaker's bill on account of an employee." This is verbatim. "Examiners and surgeons, if properly trained in the method of handling men to get best results, can make themselves a very potent factor *in the company's interests*, ... by reason of their . . . . high standing . . . . they can be made an even more valuable asset to the company." "They are influential in private life, and hold all sorts of political offices from health officer, coroner, town councilor, mayor, to member of state and national legislatures." Their "influence is lost to companies to a great extent in the absence of the organizations possible to a company operating a relief department." All these things out of the doctors for an annual pass! And ingenuously acknowledged by Mr. Barr, who forgets that the surgeons and examiners are supposed to be using their time for the relief department and its injured members, and are not employed—openly, at least—to usurp the functions of the company's claim agents and adjusters.

Mr. Redfern says: "In carrying out its obligations the company in money spent and services furnished, practically contributes dollar for dollar with its employees." Mr. Redfern has allowed his imagination free play in the foregoing. He states later that "members have contributed $7,000,000 and the company $1,250,000 in cash, paying operating expenses and making good guaranteed deficits." "The company's contribution does not include office space, soliciting, collections, work done in the departments." Is Mr. Redfern serious in asking us to believe that those items represent the remaining $5,750,000 in cash necessary to balance the men's money? "Applicants have the matter of membership presented to them by employing officers," and "while membership is not compulsory, yet in employing men, we naturally give preference to the man who is desirous of protecting himself against the inevitable disability and death," and who is willing, incidentally, to sign a release to the company for the expenses of the same. This method makes it reasonably sure that permanent employees of the operating departments of the Chicago, Burlington & Quincy who have not signed the release are hard to find.

Are the associations in fact mutual in the sense that the rights and equities of all parties to the contract are equally safeguarded?

Are they in fact voluntary as to acceptance of benefits?

Is there a consideration from each party commensurate with the benefits accruing to each party?

Are they in harmony with contemporary law as expressed in statutes or as expounded from the bench?

To the unsuspecting student of department by-laws, these "mutual" systems of relief would appear to divide themselves quite simply into those which are voluntary—which the men join or not as they choose—and those which are involuntary—which the men must join if they would enter permanent service. The term "optional" might be supposed to indicate the method used by employers to secure a membership for the departments. Only one company makes membership in the department frankly obligatory. Railroad companies maintaining so-called voluntary relief organizations based on release contracts encourage this notion of their optional character by calling attention rather ostentatiously to the fact that the membership totals comprise but 50–75 per cent[1] of all employees, thus proving the initial voluntary element to their own satisfaction and often to that of the courts. But a closer scrutiny discloses (*a*) that the uncovered minority are agents, clerks, office employees, shop men, section hands, etc., who rarely sustain severe injuries or bring suits; (*b*) that practically all the men in the operating departments are covered; and (*c*) that permanent service in these departments is hermetically sealed against those who cannot see their way clear to make an application for membership in the voluntary relief department.[2]

The query naturally arises: How could any coercive agreement to accept certain future compensation for certain unknown future injuries due to as yet unknown causes have any legal standing? To initiate the transaction a dangerous degree of coercion is certainly employed in practice, even if not in theory or in law; when business presses, the casual employee may take temporary service on the extra-list in the hazardous operating departments, but rarely are any except veteran employees kept permanently on the

[1] See p. 112 and note 3.

[2] See note, pp. 116–117.

pay-roll unless the release-application has been executed and turned in. The employer has been forced by this menacing aspect of the theory of contracts toward these easily ascertained restrictions placed on those seeking employment, to take refuge in the contention that the point is inconsequent and not susceptible of proof, and that the real crisis where a necessary exercise of the right of option develops and is carefully safe guarded, is after the employee has been injured, and when he may use his free will to choose whether he will accept the relief benefits or sue his employer. This contention is clearly an after-thought developed out of legal exigencies, and the contract maintains a stony silence as to any such option, but relief officials now consider the point well taken and definitely settled. Some departments—as a logical outflow from this reasoning—return to the injured employee, when requested and when he has indicated his intention to sue, all assessments (consideration) paid in by him during his membership; such return of unearned consideration, however, is not a usual policy. The courts—it must be admitted—have leaned[1] toward this view of the contract,[2] and have held that although the employer may have somehow persuaded an employee to consent to deductions, the latter is not thereby deprived of his free will, since later on he is left in a position where he may freely choose between accepting benefits or suing his employer—though the cash contribution is more or less involuntary, the option of accepting or refusing the benefits to which his insurance premium should unrestrictedly entitle him is left perfectly open. Cold comfort! He may sue if he chooses, and by so doing break his contract and release the relief department from its

[1] *Ringle* v. *Pennsylvania R.R.*, 164 Pa., 529, Pennsylvania case.

Dunning & Meyer v. *Atlantic Coast Line*, 166 Fed. Rep., 850, 1908, South Carolina case.

Day v. *Atlantic Coast Line*, U.S. Supreme Court, April, 1910, 179, Fed. Rep., 26, Virginia case.

The decision in the last two cases emasculated state laws.

[2] The present release contract has undergone some ingenious changes from its original form. The employee *does not agree to accept the benefits*, but *he agrees that "acceptance of benefits shall operate as a release of all claims."* Very few employees are bold enough to risk losing a moderate but certain compensation for the uncertain privilege of securing a judicial exposition of the subtle verbiage of the company's release contract.

already paid-for obligation to provide him an indemnity for his disability. Is this logic or casuistry? What becomes of the servant's clear equity in the insurance benefits for which his assessments have paid, and which in most cases he must forfeit if he rejects the release and the relief which goes with it. To the mind not accustomed to the intricacies of legal casuistry it would appear that whichever end of this involuntary bargain the employee accepts, he gets the worst of it, and that the entire arrangement is against good public policy and calls for an exercise of the state's police power.[1]

Now as to actual mutuality and equitable proportioning of contributions between master and men. By the term "mutual," as legally applied to relief organizations participated in by masters and servants, we mean those toward which both contribute a certain ascertainable quota of money or its equivalent, and by virtue of which both draw certain measurable benefits and assume certain obligations.

When the release contract is not a part of the scheme, the employer contributes little or nothing in cash and still less in other ways beyond office or building rent, transportation, and "management." In return he receives a complete surgical and hospital organization for his exclusive use, with absolute control of personnel and plant, and an unobstructed field of operation for his claim department in dealing with injured passengers, employees, and wayfarers.

When the release contract is used, as by the six roads under discussion, any contribution to relief funds made, or claimed to be made by employers, contains just value enough to give a semblance of legal force and mutuality to the contract, but an amount altogether insignificant from any equitable standpoint. A perusal of the annual statements furnished by many of the relief departments, and already analyzed, shows that oftentimes no real cash is turned in for actual relief, and that there is more or less manipulation to show a valuable consideration. Most "company's contributions" have been but shadowy semblances of the real thing, and are speciously set forth as "management," "handling of funds," "guaranty of

[1] *Maguire* v. *Chicago, Burlington & Quincy R.R., post.*

funds," "making up any deficits," "office rent and expenses," "transportation," "telegraph facilities," "services of surgeons and adjusters"—really the claim, surgical, and law departments served up under a different disguise, but with no additional cost, and with an almost total saving to the employer of the price of maintenance, settlements, and litigation.[1] The greater part of this enormous saving can come from nowhere but out of the funds contributed by the men, who not only actually pay for a large proportion of their surgical relief, but also settle most of their own casualty claims against the company out of their own pockets.

It takes no spectacles to see that, even where the courts have held the release contracts valid because of the presence of free will and consideration in legal quantities, the letter of the law has been satisfied on all points at the expense of economic justice and of the real equity of the situation.

VII

What cognizance has contemporary law taken of the use made by railroads of their relief departments for the purpose of securing release contracts from their employees?

In the following states[2] the contracts have received legislative recognition in the shape of statutes variously prohibiting and penalizing their use: Ohio, Missouri, Iowa, Virginia, South Carolina, Florida, Georgia, Indiana, New York, Montana, Nebraska, Nevada, Texas, North and South Dakota. An effort to secure the enactment of a similar law was defeated at a recent session of the Illinois legislature. In most of these states the statute has been promptly nullified or emasculated by judicial action.

Our judiciary has favored the country with a bountiful harvest of rulings bearing on the various aspects of release contracts put out by railroads under cover of their mutual relief departments. Many of these rulings are in conflict, and their general average is none too illuminating. There can be no question but that the courts, through willingness to satisfy themselves with the letter

[1] For an analysis of these items see the previous paper, *Jour. of Political Economy*, XX, 49–78.

[2] This list is probably incomplete.

of the law, and through unwillingness properly to investigate the genuineness of free will and mutuality and the adequate apportioning of contributions, have leaned unduly and unjustly toward the side of the employer.

Courts have given sufficient sanction to the departments to warrant their continued existence—at least for the present—on the theory that they are not for pecuniary profit but are a reasonably integral and necessary part of the machinery of any chartered enterprise,[1] that they are not *ultra vires*, not against public policy, and that their contract contains sufficient consideration.

It has been held that the fact that an employee signed a release contract before entering service is sufficient evidence of free will. The mere fact that the application for membership in the relief association and the release contract with the railroad are parts of the same document—which may even also be an employment application[2]—and that it is handed to the prospective employee coincidently with his application for employment, does not, in the opinion of courts, supply an element of coercion sufficient to render the contract illegal.

Courts have held the release contracts valid and not against public policy,[3] on the theory already alluded to that they allow the employee the option of suing or accepting benefits after he is injured; also that they do not restrict the right of contract, but rather enlarge that right.

These rulings—usually of United States courts, but also of state courts—have come sharply into conflict with, and have defeated state statutes designed to forbid the use of railroad relief associations for the purpose of securing anticipatory waivers or

[1] *State* v. *Pittsburgh, Cincinnati, Chicago & St. Louis R.R.*, Ohio Circuit Court, 1903, 67 N.E. Rep., 93. Also *Cox* v. *Pittsburgh, Cincinnati, Chicago & St. Louis R.R.*, Ohio Circuit Court, 1896; 55 Ohio, 497. In *Miller* v. *Chicago, Burlington & Quincy* the Federal Circuit Court held v. railroad, 65 Fed. Rep., 305; but the Federal Court of Appeals, 76 Fed. Rep., 439 intimated that it would have upheld the contract, if a sufficient consideration had been shown; Colorado case, 1894.

[2] The Baltimore & Ohio contract of employment and relief department application-release contract are parts of the same document.

[3] *Hamilton* v. *St. Louis, Kansas & Northwestern* (*Chicago, Burlington & Quincy R.R.*) in United States Circuit Court for E. District Mo., 1902. 118, Fed. Rep. 92, Missouri case. Also *Atlantic Coast Line* v. *Dunning*.

releases from employees. The courts will not sustain any law interfering with the right of contract made sacred by the Fourteenth Amendment of the constitution, unless it can be clearly shown that actual coercion was used to secure signatures. The applicant's signature is held to be technically valid, so far as free will is concerned, for he certainly has the option to refuse to sign, and the mere fact that by so doing he would often reject employment does not, in the opinion of the courts, constitute sufficient coercion to invalidate his signature.

The courts have at times shown an apparently unnecessary ingenuity in defeating the plain intention of statutes and constitutional clauses framed especially for the purpose of prohibiting contracts procured through this kind of evasion. For example, in *Day* v. *Atlantic Coast Line*, United States Circuit Court of Appeals, April, 1910, it was contended that the Virginia constitution definitely prohibited contracts waiving employee's right to recover for injury; but the court refused to consider the contract a waiver, and held that it was an *agreement to elect either* to take benefits or to sue, but not to do both. The court ignored the facts that no agreement to elect is mentioned in the contract, that without the contract Day could probably not have secured employment, and that if he elected to sue he forfeited his assessments and the rights to which these should have entitled him. This court—C. J. Fuller and Morris—held[1] also that the contract was not against public policy. Ohio in 1890 and Missouri in 1899 prohibited waiver contracts between employers and prospective employees, and Ohio made the solicitation of such contracts a finable offense, but the purpose of the Ohio statute—aimed directly at the Pennsylvania and Baltimore & Ohio railroads—was defeated in the courts, in so far as it applied to mutual relief associations. Other state and federal courts also have upheld the constitutional right to make such contracts. So that the courts and the legislatures of several states are at odds over the fundamental right of the employer to make the membership-release contract a feature of employment.

The latest as well as the most important of all decisions bearing

[1] *Atlantic Coast Line R.R.* v. *Dunning*, 166 Fed. Rep., 850; also *Owens* v. *Baltimore & Ohio R.R.* 35, Fed. Rep. 715.

on the intrastate status of these associations and their release contracts was handed down by the United States Supreme Court February 20, 1911, in the case of *Maguire* v. *Chicago, Burlington & Quincy R.R.*,[1] the opinion being written by Mr. Justice Hughes and unanimously concurred in by the other members of the court. This case (131 Iowa, 340; 138 Iowa, 664; 108 N.W.R., 702), after nearly ten years of litigation, reached a final adjudication in October, 1910. C. L. Maguire was injured in the employ of the Chicago, Burlington & Quincy R.R., in Iowa, in 1900. He was a member of the Burlington Relief and accepted $822 from that fund. Under Sec. 2071 of the Iowa Code, amended in 1898, he brought a suit against his employer, contending that the release contract which he had signed on entering employment was invalidated by the Code. Sec. 2071 specifies that no contract which restricts the liability of an employer for future injuries inflicted on an employee at work shall be binding. The amendment strengthens the original section as to release contracts with companies and their relief funds by expressly providing, "nor shall the acceptance of such relief, nor any contract providing insurance benefits entered into prior to the injury, constitute any bar or defense to any cause of action brought under the provisions of this section"—"but nothing herein shall prevent settlement for damages between parties subsequent to the injury." The Iowa court awarded Maguire $2,000 and the railroad appealed.[2] In affirming the judgment of the Iowa courts the United States Supreme Court held that: the Federal Supreme Court is not called on to decide as to the wisdom of state laws—merely are they constitutional? Within the constitution, the legislature decides as to questions of public policy. A state, as a proper exercise of the police power, has the right to prohibit contracts made in advance of injury and to invalidate all the provisions of such contracts. Such a statute does not impair the liberty of contract guaranteed by the Fourteenth Amendment, and the court so holds in regard to the Iowa statute relative to railroad employees. Freedom of contract is a qualified and not an absolute right. Liberty implies absence of arbitrary restraint—not immunity from reason-

[1] *Chicago, Burlington & Quincy R.R.* v. *Maguire*, 219 U.S., 549.

[2] 131 Iowa, 340; 138 Iowa, 664.

able regulation. The exercise of reasonable police power is not subject to judicial review. The statute of Iowa is within the police power of the state, has a reasonable relation to the matter regulated, and is not unconstitutional under the Fourteenth Amendment. The decision of the court is affirmed.

It would seem that this decision, far-reaching and fundamental in its effect, should put at rest for all time the contention that the validity of contracts of this kind is necessarily protected by the United States constitution, and that they cannot be successfully prohibited by statute. Under this decision the state has a right to inquire into the equity of the contract and to use its police power to interfere to prevent its enforcement, if it is found to be in discord with sound public policy.

The courts have dealt frequently and variously with the consideration phases of these contracts. The mere fact of employment does not constitute a consideration from the employer, and, once having entered into a bargain, the latter must still further validate it by showing a valuable consideration. This the railroads have learned to their cost many times, by the refusal of courts—on the broad basis of lack of consideration—to sustain the crude, old-fashioned blanket releases—"death warrants"—by which every railroad employee was formerly led to "trade his legs for a job" merely in consideration of employment.[1] The same is true of the "dollar releases" still taken by employers from shop hands who have sustained supposedly minor injuries. This is the view usually, but not invariably, taken by the courts, in cases where the demand for indemnity is based on the claim that the release contract of the relief association is void on account of lack of a material and visible payment into the fund by the employers, to offset the assessments collected by him from his men. Should the record fail to show that the employer has made good his claim that the association is in fact mutual as between employer and employee, as well as voluntary, and that both have actually made and can show material contributions to the fund, then any contract based on the mutuality of the association is void, and the employer loses his

[1] The practice of obliging the men to sign these releases is still kept up by many railroads, but they now seem to have small legal value.

immunity from the claim for damages inflicted on the employee. In the case of *Atlantic Coast Line R.R.* v. *Beazly* appeal was denied the company and a judgment for $20,000 was affirmed, because the company failed to show the court that it had made payments into the fund.[1] A study of the methods of organization and flotation (see *ante*) of all of these funds, shows that were the courts to go into the question of *equitable* mutuality and adequate proportioning of contributions, they would be justified in throwing out, not only the Atlantic Coast Line R.R. contract, but also those of all roads operating mutual relief associations. But the point on which appeal in this case was denied was not on the lack of equitable consideration, but on the strictly technical failure to demonstrate any consideration at all. This was also the basis of an affirmation of judgment in the Colorado case of *Miller* v. *Chicago, Burlington & Quincy R.R.*, where the United States Circuit Court of Appeals conceded the right of the company to make the release contract a part of its relief system, but also upheld the judgment of the court below against the railroad, because the latter failed to show any consideration paid by it into the fund to bind the release.[2] In *Owen* v. *Baltimore & Ohio R.R.* (1888),[3] and in many subsequent cases, the courts have held that when the employer showed a *material* contribution to the relief fund he thereby acquired tangible and inalienable rights under the contract, and the workman must choose whether he will take his prescribed benefits or proceed at law against his employer. He cannot do both. The courts have never gone so far into the matter as to discuss whether the contributions by the parties to these contracts adequately balance one another, and have invariably proceeded on the assumption that the consideration once shown, a reasonable foresight as to its equity may be taken for granted. It is hard for the observer of unlegal mind to avoid voicing the query—if the courts see fit to enter at all into an inquiry as to the mere existence of consideration, free will, and mutuality in these contracts, why, after such a bold beginning, should they not go to the root of the

[1] 45 Southern Reporter, 761, Florida case.

[2] 65 Fed. Rep., 305 (1894), and 76 Fed. Rep., 439.

[3] 35 Fed. Rep., 715.

matter and investigate as to sufficiency of consideration—instead of resting content with the discovery that "the company" has contributed "materially" to the relief fund?

VIII

We may now briefly recapitulate the important points brought out in our discussion of this system of compensation as it now exists on six American railroads:

The "relief" is unchartered; is organized as a company department; is officered, controlled, and manned by the company; is a powerful force operating primarily in the interest of the company; and yet is an instrument so ingeniously, but nominally, separated from the company as to convey the impression that it operates as a free agent.

It enables the company to dispense altogether with its own surgical department for relief of injured employees, relieves the claim and legal departments of a large share of their expensive duties and expenditures, and discharges the company's treasury of an important load of salaries, donations, half-pay, settlements, and judgments.

For this relief the employing body pays insignificantly and inadequately, and the servant pays extravagantly. The latter could for a slightly higher premium insure himself under a health and accident policy and save his legal right to recover from a negligent employer.

In two important particulars are the insurance equities of the employee either lost sight of, or intentionally slighted in planning the details of these systems.[1] Both of these omissions inure greatly to the advantage of the company.

First: The contributions are not graduated for age as they should have been when planning an otherwise complete life insurance system. This oversight may have been due to ignorance of the essentials of correct life insurance, but was more probably due to the fact that the primary object of the association is to cover the companies' indemnities payable to the employees for accident; in this case age, of course, is a negligible factor. Furthermore, the

[1] See also Willoughby, *Workingmen's Insurance*, pp. 312 f.

introduction of graduated age premiums might by their high cost crowd out of dangerous posts old employees whom the company especially desires of conciliating and insuring. Under this system the younger men pay a goodly portion of the premiums on the older lives.

Second: Under some of the systems the insurance is altogether forfeitable when the employee quits service, and no provision is made for allowing him to keep it up even though the fund would be in no way the loser by such continuance. This penalizes the quitting employee out of his equity, is hardly in accord with correct insurance principles, and separates the funds at once from those organized on any strictly actuarial basis. Yet the omission is highly advantageous to the company in that it not only holds the men in the service, but strengthens the surplus and lessens the deficit liability to the extent of the unsatisfied premiums. Closely in accord with a policy so advantageous toward the company, we find not only that suit brought against the company results in immediate forfeiture of all rights against the association and its fund, but should the employee recover in his suit, the company is not infrequently reimbursed from the fund to the extent of the amount which would have been paid to the employee had he not sued.[1]

Where the department is operated as a "voluntary relief," it is voluntary in name only in the hazardous occupations—in those branches of the service membership is practically a *sine qua non* of employment.

Membership in the relief fund for the employee, and a release for the employer from contingent liability for future injuries to be inflicted on the employee are obtained by the applicant's signature to one document, This document is legalized by whatever the company contributes to the fund, and the courts sustain the transaction if any consideration is shown.

The legal consciences of courts as to the technical validity of these procedures is assuaged by the theory that the signature of the employee is in fact voluntary, and by the further assumption that he is left free, in case of injury, to use his option of accepting benefits and releasing the company, or of forfeiting his assessments

[1] See note, p. 116.

and the benefits they have paid for, and taking his constitutional right of action against his employer. If he does not accept relief, this right is conceded to him. If he accepts partial relief, the right is contested with varying results.[1] The courts have little opinion as to his unsatisfied equity arising from the paid-in assessments, and there are few recorded cases where they have been returned to him. Nor have the courts any well-considered opinion as to the adequacy of the contributions by which the companies secure so large a share of the benefits.

The mechanism through which the companies manage these funds serves the double purpose of elaborating and maintaining an important department of service at a minimum cost, and of furnishing carefully nourished items of expenditure with which to establish sufficient mutuality and consideration to justify their release contract before the technical eye of the courts. The hand of the claim agent is writ large in every move of the relief department.

Most of the companies in question examine applicants for the service at the expense of the fund. Some of the companies make a cash payment into the fund on account of these examinations, but the payment is shown in the annual statement as a company's cash contribution to *relief*—which it is never expended for.

Several companies maintain pension systems for superannuated employees. This is not a legitimate part of any relief system, but the annual payment for pensions sometimes appears as another cash item contributed to relief.

All of the companies agree to make up deficits, and the Baltimore & Ohio R.R. contributes $6,000 annually to meet this item, but with the proviso that if the deficit is non-existent the contribution goes to the pension account. Deficits rarely occur and are always insignificant, since assessments are maintained at a level reasonably certain to produce an unusable surplus. All of these misplaced or exaggerated items would seem to be introduced into relief department statements to establish sufficient mutuality and consideration to satisfy the scrutiny of courts into the validity of the release contract.

Beyond insisting on the fact of a tangible consideration in the

[1] See *Pennsylvania R.R.* v. *Chapman;* Ill. S.C. 77 N.E. Rep., 248.

way of a contribution of some kind by the company to the fund, the courts have not felt called on to inquire as to the sufficiency of the contribution. The courts, as a rule, have been disposed to uphold the release contract. In some instances the courts have accepted the contract without insisting on cash contributions from the employer.

Repeated efforts on the part of state legislatures to correct by statute the injustice of the release contract and the insufficiency of employers' contributions, or actually to forbid the use of relief associations as a means of securing release contracts, have been almost uniformly blocked in both state and federal courts. But the recent and more enlightened ruling of the United States Supreme Court in the Maguire–Chicago, Burlington & Quincy R.R. case is likely to work a radical change in the status of relief departments in states prohibiting release contracts.

IX

In passing judgment on the usefulness, past and present, and the reasons for continued existence of these organizations, we must take into account not only the period during which the first of them sprang up, but also the local conditions which they have in a measure replaced.[1] They should also be tested by the standards of present-day public sentiment, by the tendencies of statutory and judge-made law, and by the requirements of contemporary local and general conditions of economics and industry.

The quarter-century 1870–95 was notable for a maximum development of the common-law theory of individualism as applied to American corporations, and the personal individual suffered accordingly. The chief sufferer—not even excepting the consumer—was the workman, and the chief instruments which the corporation wielded, and still wields to his undoing unless forbidden by statute, were the common law and the constitutional right of contract. Locally and nationally judge-made law protected the employer at the expense of the employee, and the worst offender both through its corporations and through its judiciary was, and

[1] See also Henderson, *Industrial Insurance in the United States*, pp. 239 f.

still is, the state which has profited most by the expenditure of the blood of its workmen—Pennsylvania.[1]

The most potent force in Pennsylvania is, and has been for many years, the Pennsylvania Railroad. While it would lead too far into ancient history to discuss at this time whatever motive was at the bottom of the original conception of mutual relief, it will be ever to the credit of this great corporation that, without coercion by law or public opinion, voluntarily and without the stimulation of foreign or American examples, at a time when the injured American workman and especially the workman of Pennsylvania could see little ahead of himself and his family but starvation, it entered (1886) into an agreement with its employees systematically conceding and securing to them, without process of law and in fact without consideration of liability, far more than they could have ever secured under either federal or state laws as they then existed, or even under Pennsylvania laws as they stand today. In the same spirit of frank commendation we should speak of the relief departments of the Baltimore & Ohio R.R.,[2] the Philadelphia & Reading R.R., the Lehigh Valley R.R., and the Chicago, Burlington & Quincy R.R.—all organized during the eighties, before the day of the Federal Safety Appliance Act (1892) and Employers' Liability Act (1908), and before the changes which public opinion, expressed through state and national statutes, is now effecting in the common-law aspects of employers' liability. European industrial law was also at that time still in an amorphous condition. These relief departments were therefore voluntary high-water marks reached in America by a pseudo-benevolent industrial paternalism acting independently of law.

Under the system of corporation-nurtured common law prevailing throughout the Union during the eighties, and which flourishes even today with but few of its abuses abated except by statute, the judges made law for the employer only, and the disabled workman saw none of the legal relief which was and is still coming through federal and state statutes. We have therefore but

[1] For a closely detailed account of present-day conditions in Pennsylvania see, C. Eastman, *op. cit.* See also the present Pennsylvania Employers' Liability Act.

[2] This, as a chartered employees' body, really antedated that of the Pennsylvania Railroad.

to compare the present status of the injured employee of the Pennsylvania Railroad with that of the workman for other intrastate Pennsylvania corporations, to realize the benefits which the organization of that company's relief department has brought and still brings to its participants.

But times and laws unfold themselves; economic, state, and national morality develops; conditions of industry have shifted; and the force of foreign example is now the strongest of all the influences shaming us reluctantly toward change in the attitude of the employer toward the injured employee. With all these changes in public standards the mutual associations of these six railroads have not changed, and though yesterday they were the greatest leaders in the industrial relief movement they are today obsolescent laggards on the road toward a just and genuine workingmen's compensation. And this in spite of the fact that the systems as originally laid down on the Baltimore & Ohio and Pennsylvania railroads are still fundamentally correct, and need only an adjustment of the ratio between the contributions of masters and men to set them altogether right from the most modern viewpoint.

Today in many state tribunals and before the federal courts, the injured employee, if he does but choose to try the issue and is unhampered by a release contract, can call for and secure for a wide range of accident a juster and higher compensation than can be had through "voluntary" contributions to "mutual" relief associations. He can secure for nearly the same cost, through an accident and health insurance policy, benefits quite as adequate and certain as from the "Fund," and can in addition preserve intact and unquestioned his rights from his employer under the law.

The compensation which should be paid to the injured workman, and our notions of the legitimate sources of his indemnity have changed with the changes in twentieth-century legal and industrial viewpoints on almost all economic questions, and it would look as though the time were not far distant when the employer is to feel the constraint which public opinion on many matters of industrial ethics and economy will crystallize into concrete form on the statute book. But these old employers and their representatives,

wedded to once-advanced systems, have failed to see and respond to changed and changing standards, and the casualty manager and the claims attorney and the relief superintendent still contend that the sources of their compensation funds are still equitably tapped.

It has taken more than a decade's operation of a Federal Safety Appliances Act, with a time clause several times extended, to convince certain ultra-conservative master mechanics that the standardization of the couplers, draw bars, and air brakes of American rolling stock is a feasible proposition. While we are surely at the dawn of an era of statutory and compulsory workmen's compensation, it is not unlikely that even at the end of another decade we shall still in like manner find railroad attorneys arguing with courts and commerce commissions over the injustices of the coming statute, or pleading for a vitally necessary extension of time to enable "the company" to comply with its provisions.

Should the workmen's compensation bill which is now under discussion before Congress become a law, we may add a word of forecast gleaned from a consideration of the past methods pursued by railroads in the management of relief funds. The latest draft of the bill proposed by the Federal Employers' Liability and Workmen's Compensation Commission provides that:

> SECTION 19. If the Interstate Commerce Commission certifies that any scheme of compensation for the employees of any common carrier provides compensation not less favorable than the scales contained in this Act, and where the scheme provides for contributions by the employees, and benefits are conferred thereby at least equivalent to such contributions, in addition to the benefits under this Act, the employer may agree with his employees that his plan shall be substituted for the provision of this Act, and thereupon the employer shall be liable only in accordance with the plan.

If this bill becomes a law, the six railroads discussed in the present paper will undoubtedly seek to perpetuate their relief departments under the clause just quoted, and will come into court to show that these organizations are entitled to continue in existence by virtue of conformity with the provisions of the act. If the past legal and financial history of the relations of railroad relief organizations to railroad employees furnishes any standard by which we may forecast the future, we may reasonably expect that the combined talent of the law and auditing departments of every

railroad concerned will be strained to the utmost to produce statistical and actuarial novelties which will be adequate to meet the occasion without unduly straining the financial resources of the corporation which they serve.

Our study shows that the statistics of these funds have in the past been unblushingly manipulated to show even enough equity and consideration to satisfy the complacent scrutiny of our courts into the legality of release contracts. If we look for better things from the future, is it unreasonable to base that expectation on a demand that a genuine and efficient scrutiny of financial details be exercised by those courts or commissions which are given jurisdiction over such railroad relief departments as are allowed to continue in existence after the statute becomes operative?

W. H. ALLPORT

CHICAGO, ILL.